APPELLANT, PRO SE:

MICHAEL A. FERRELL
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JUSTIN F. ROEBEL
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL ANTHONY FERRELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0603-PC-95
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0311-PC-151

January 9, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Michael Ferrell (Ferrell), appeals the post-conviction court's denial of his Request for Change of Judge and Petition for Post-Conviction Relief.

We affirm.

ISSUES

Ferrell raises three issues on appeal, which we restate as follows:

(1) Whether Ferrell received ineffective assistance of his trial counsel;

(2) Whether Ferrell received ineffective assistance of his appellate counsel; and

(3) Whether the post-conviction court erred in denying Ferrell's Request for Change of Judge.

FACTS AND PROCEDURAL HISTORY

In our memorandum decision, *Ferrell v. State*, 786 N.E.2d 812 (Ind. Ct. App. 2003), we found the facts supporting Ferrell's conviction as follows:

> On March 20, 2002, Fort Wayne Police Detective James Seay (Detective Seay) procured $1,000.00 in pre-recorded U.S. currency to consummate a cocaine purchase arranged by a confidential informant. Detective Seay and the informant met a woman named Kathy at a gas station. Kathy told Detective Seay that he should drive to another location, but Detective Seay refused to do so. Ferrell, who had been standing nearby at the gas station, conferred with Kathy and walked over to Detective Seay's vehicle.
>
> Ferrell tried to convince Detective Seay to change the location of the buy. However, when Detective Seay continued to oppose the change of location, Ferrell climbed into the back seat of Detective Seay's vehicle. Detective Seay counted out $1,000.00, and Ferrell pitched a bag containing a substance later identified as cocaine into the front seat. Detective Seay attempted to hand Ferrell the money, but Ferrell slapped the money out of Detective [Seay's] hand as backup police arrived.

> On March 26, 2002, the State charged Ferrell with Dealing in Cocaine in an amount of three grams or more, which increased the charge from a Class B felony to a Class A felony. Ferrell was convicted at the conclusion of a bench trial held on June 26, 2002, and was sentenced to fifty years imprisonment.

(Appellant's App. pp. 96-97).

On direct appeal, Ferrell challenged the trial court's denial of his request for a continuance, the finding that the evidence used to prove the accuracy of a scale used to weigh the cocaine was sufficient, and that there was sufficient evidence he delivered cocaine to Detective Seay.

On November 18, 2003, Ferrell filed a *pro se* Motion for Post-Conviction Relief, Motion for Change of Venue from the Judge, and an Affidavit in Support of Motion for Change of Judge. On November 1, 2004, the post-conviction court denied the Motion for Change of Venue from the Judge stating:

> [I]t fails to state facts to support a rational inference of bias and prejudice on the part of this judge. [Ferrell] alleges that this judge was "high or drunk during his trial and sentencing resulting in [Ferrell's] filing a complaint against him to the Indiana Commission on Judicial Qualifications." This [post-conviction court] has no knowledge of any complaint filed by [Ferrell] against this [c]ourt, nor are there any proceedings currently pending against this [c]ourt as a result of the defendant's alleged filing. Furthermore, this [c]ourt emphatically denies that it was "high or drunk" during any of the proceedings herein.

(Appellant's App. p. 20).

Ferrell's Motion for Post-Conviction Relief was amended twice. Ultimately, he argued ineffective assistance of his trial counsel based on his (1) failure to proffer a lesser included instruction, (2) failure to raise entrapment defense, (3) an actual conflict of interest between he and his trial counsel, and (4) failure to subject the State's case to

meaningful adversarial testing. On November 21, 2005, a hearing was held. At the end of the hearing the post-conviction court took the matter under advisement and on January 27, 2006, issued the following Conclusions of Law:

CONCLUSIONS OF LAW

1. In order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that he was denied a fair trial, or an effective appeal, when the conviction or sentence resulted from a "breakdown in the adversarial process that rendered the result unreliable." *Strickland v. Washington*, 466 U.S. 668 (1984)[, *reh'g denied*]; *Lawrence v. State*, 464 N.E.2d 1291 (Ind. 1984). To accomplish this, the defendant must ordinarily show both (1) that counsel'[s] performance was deficient, and (2) that the deficient performance prejudiced the defense. *Bouye v. State*, 699 N.E.2d 620 (Ind. 1998). Because "the object of an ineffectiveness claim is not to grade counsel's performance," a court need not determine whether counsel's performance was deficient before determining whether the defendant suffered prejudice; rather, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Id.* at 623. [] In certain extreme circumstances, prejudice to the defendant is presumed[,] such as when counsel actively represents conflicting interest[s], or when counsel entirely failed to subject the prosecution's case to "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648 (1984).

2. [Ferrell] alleges that [a] conflict of interest existed between himself and [his trial counsel]. To establish that counsel's performance was adversely affected by an actual conflict of interest, a convicted defendant must show (1) a plausible strategy or tactic that was not followed but might have been pursued, and (2) an inconsistency between that strategy or tactic and counsel's other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict. *Woods v. State*, 701 N.E.2d 1208 (Ind. 1998)[, *reh'g denied*, *cert. denied*]. Other than the filing of the grievance, the petitioner has not made any showing that [his trial counsel] stood to gain anything at the petitioner's expense. Furthermore, defendants cannot unilaterally create conflicts of interest by filing disciplinary grievances against their attorneys. *United States v. Burns*, 990 F.2d 1426 (4th Cir. 1993)[, *cert. denied*].

3. [Ferrell] alleges that his right of effective assistance of counsel was violated in that [his trial counsel] entirely failed to subject the prosecution's case to "meaningful adversarial testing." Under the *Cronic* standard, an attorney may "entirely fail to subject the prosecution's case to meaningful adversarial testing" when the attorney effectively conceded at trial that the defendant is guilty. *Christian v. State*, 712 N.E.2d 4 (Ind. Ct. App. 1999). [Ferrell's trial counsel's] representation of petitioner falls far short of this requirement.

4. A showing of insufficient consultation or preparation does not alone suffice to prove ineffective assistance; the defendant must also show that such deficiencies resulted in deficient performance at trial. *Ford v. State*, 523 N.E.2d 742 (Ind. 1988).

5. Deficiencies regarding probable cause do not warrant dismissal of an information charging a crime. *Hicks v. State*, 544 N.E.2d 500 (Ind. 1989). Therefore, even if [Ferrell's trial counsel] had prevailed on this issue he would not have secured a dismissal or a reduction of the charge. Accordingly, no ineffectiveness occurred.

6. For an allegation that ineffectiveness occurred due to not calling a witness there must be more than just the petitioner testifying what the witness would have testified about. And how that testimony would have affected the outcome of the trial. *Hunter v. State*, 578 N.E.2d 353 (Ind. 1987)[, *reh'g denied*]. No such evidence was presented at the hearing.

7. The defense of entrapment requires that the State of Indiana prove beyond a reasonable doubt that either the prohibited conduct was not the product of police efforts, or that the defendant was predisposed to commit the prohibited conduct. [Ind. Code § 35-41-3-9]. Evidence at the trial and also at the hearing on this matter clearly showed that [Ferrell] was predisposed to commit the offense. He knew the officer wanted to buy cocaine. Even though he told the officer he didn't want to sell cocaine, the defendant asked the officer if he was the police and entered the car after being told that he wasn't an officer. Only when the backup officers appeared did [Ferrell] attempt to distance himself from the 28 grams of cocaine. Predisposition was clearly shown.

8. This same evidence also shows that [Ferrell] was not entitled to a finding of guilty of [p]ossession of [c]ocaine, since there was not a serious evidentiary issue on that fact.

9. Petitioner has failed to prove his claim on the merits by a preponderance of the evidence.

10. The Petition for Post-Conviction Relief is hereby denied.

(Appellant's App. pp. 63-65).

Ferrell now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Ferrell claims the post-conviction court erred in denying his Request for Change of Judge and Petition for Post-Conviction Relief. Specifically, Ferrell argues (1) his trial counsel provided ineffective assistance (a) by failing to tender a lesser included instruction on possession, (b) by failing to argue the entrapment defense, (c) due to an actual breakdown in communication between Ferrell and his trial counsel, and (d) by not subjecting the State's case to any adversarial testing; (2) his appellate counsel provided ineffective assistance by "surrendering his argument;" and (3) the post-conviction court was unable to "receive evidence in a neutral and detached fashion." (Appellant's Br. pp. 25, 31).

I. *Standard of Review*

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. Ferrell has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); s*ee also id.* Because Ferrell is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to

believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See id*.; s*ee also Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*. It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

II. *Ineffective Assistance of Counsel*

The right to effective counsel is rooted in the Sixth Amendment of the United States Constitution. *Taylor v. State*, 840 N.E.2d 324 (Ind. 2006). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id*. (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984), *reh'g denied*). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. When called upon to find whether there was ineffective assistance of trial counsel, we use the analysis outlined by the Supreme Court in *Strickland*:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot

> be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. A petitioner's failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999), *reh'g denied, cert. denied*. The standard by which we review claims of ineffective assistance of appellate counsel is the same standard applicable to claims of trial counsel ineffectiveness; the defendant must show that appellate counsel was deficient in his performance and that deficiency resulted in prejudice. *Johnson v. State*, 832 N.E.2d 985, 1005-06 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. Additionally, as our supreme court cautioned in *Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998), *reh'g denied, cert. denied*, "issues that were or could have been raised on direct appeal are not available in post-conviction proceedings since post-conviction is not a super appeal." *See also Slusher v. State*, 823 N.E.2d 1219, 1221 (Ind. Ct. App. 2005).

A. *Trial Counsel*

Ferrell claims his trial counsel provided ineffective assistance (1) by failing to tender a lesser included instruction on possession, (2) by failing to argue the entrapment defense, (3) due to an actual breakdown in communication between Ferrell and his trial counsel, and (4) by not subjecting the State's case to any adversarial testing.

Trial counsel is given wide discretion in determining strategy and tactics, and therefore appellate courts will accord those decisions deference. *McCann v. State*, 854 N.E.2d 905, 909 (Ind. Ct. App. 2006). Additionally, we note that counsel's conduct is assessed based on facts known at the time and not through hindsight; and rather than

focusing on isolated instances of poor tactics or strategy in the management of a case, the effectiveness of representation is determined based on the whole course of attorney conduct. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997), *reh'g denied*, *cert. denied*.

Ferrell first argues his trial counsel rendered ineffective assistance by failing to tender a lesser-included instruction on possession. However, as the State points out, this was a bench trial and therefore no jury instructions were tendered. Additionally, the trial court found there was no "serious evidentiary issue on that fact." (Appellant's App. p. 64). We agree.

Ferrell next argues his trial counsel was ineffective for failing to assert entrapment as a defense. Entrapment,

> (a) [] is a defense that:
>
> > (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
> >
> > (2) the person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

Ind. Code § 35-41-3-9.

"Even in the context of undisputed police participation in criminal activity, if evidence of the defendant's predisposition to commit the crime is presented, the defendant is not entitled to an instruction on the entrapment defense unless he presents evidence showing a lack of predisposition." *Scott v. State*, 772 N.E.2d 473, 475 (Ind. Ct. App. 2002), *trans. denied*. Thus, to successfully raise an entrapment defense, the

defendant must first produce evidence of the government's involvement in the criminal activity and, if the State makes a *prima facie* case of predisposition, then the defendant must also produce evidence of his lack of predisposition to commit the crime. *Scott*, 772 N.E.2d at 475.

Ferrell's trial counsel stated at the post-conviction hearing:

> . . . in general, . . . in these kinds of cases – because I've defended dealing cases and – well, dope cases for . . . ten years . . . very, very, very seldom do I file entrapment defenses, because . . . unless it's clear on its face, I normally do not file entrapment defenses, as counsel knows how tough that threshold is.

(Post-Conviction Tr. p. 17).

In the instant case, a confidential informant introduced Detective Seay to a woman named Kathy. After a conversation with Detective Seay in which Kathy tried to convince Detective Seay to move the location of the buy, Kathy told Ferrell Detective Seay was unwilling to move. Trying to no avail to convince Detective Seay to move the location of the buy, Ferrell eventually entered the backseat of Detective Seay's vehicle. Detective Seay counted out $1,000.00 and Ferrell pitched twenty-eight grams of what was later determined to be cocaine into the front seat. Although Ferrell slapped the money out of Detective Seay's hand as back-up units approached, predisposition was clearly shown as Ferrell did not attempt to distance himself from the transaction until then. Based on these facts and mindful that we afford counsel great deference in determining strategies, we decline Ferrell's invitation to second guess his trial counsel's decision not to raise entrapment as a defense. *See McCann*, 854 N.E.2d at 909.

Ferrell also claims there was a breakdown in communication between himself and his trial counsel resulting in an actual conflict of interest. Indiana courts have not specifically addressed whether defendants may unilaterally create conflicts of interest by filing disciplinary grievances against their counsel. Federal courts have stated that to "allow criminal defendants anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial . . . is not an invitation we wish to extend." *U.S. v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993), *cert. denied*; *see also U.S. v. Holman*, 314 F.3d 837, 845-46 (7th Cir. 2002), *reh'g denied, cert. denied* (allowing conflicts of interest to be established solely by appealing to disciplinary authorities would encourage filing of frivolous claims by defendants for purposes of delay).

An actual conflict of interest exists between a criminal defendant and his trial counsel when defense counsel, or another client represented by defense counsel, stands to gain significantly at the defendant's expense. *Williams v. State*, 529 N.E.2d 1313, 1315-16. An adverse effect on performance caused by counsel's failure to act requires a showing of (1) a plausible strategy or tactic that was not followed but might have been pursued; and (2) an inconsistency between that strategy or tactic and counsel's other loyalties, or that the alternate strategy or tactic was not undertaken due to the conflict. *Woods*, 701 N.E.2d at 1223. Ferrell does not proffer any plausible strategy or tactic that was not followed but might have been pursued by his trial counsel. Ferrell also does not proffer any showing his trial counsel stood to gain anything at Ferrell's expense. Thus, we find there is no actual conflict of interest between Ferrell and his trial counsel.

Next, Ferrell claims his trial counsel provided ineffective assistance by not subjecting the State's case to any adversarial testing citing *United States v. Cronic*, 466 U.S. 648 (1984) (finding a presumption of ineffectiveness when counsel entirely fails to subject the State's case to "meaningful adversarial testing"). In the case at bar, the record indicates Ferrell's trial counsel had in-person and written contact with Ferrell in preparation for the trial, moved to dismiss the Class A felony charge as a result of inconsistencies in the probable cause affidavit, cross-examined the State's witnesses, elicited testimony about possible abandonment of the crime, questioned Detective Seay about the lack of charges against Ferrell's co-actors, and again argued at closing that the trial court should consider the discrepancies in the probable cause affidavit. As such, we find Ferrell's trial counsel subjected the State's case to meaningful testing.

In sum, we find Ferrell's trial court counsel provided him with adequate representation.

B. *Appellate Counsel*

Ferrell also claims ineffective assistance of his appellate counsel. In particular, he contends his appellate counsel failed to competently present his insufficient evidence argument with respect to delivery of cocaine. Ferrell proffers that had his appellate counsel challenged the constructive delivery of the cocaine to Detective Seay, rather than conceding constructive delivery was a sufficient delivery method, there is a reasonable likelihood that on direct appeal this court would have reached a different conclusion. We disagree.

A person who has direct and physical control over an item has actual possession, whereas a person who has the intent and capability to maintain control over an item has constructive possession. *Tate v. State*, 835 N.E.2d 499, 511 (Ind. Ct. App. 2005), *trans. denied*. Delivery, in pertinent part, means, "an actual or constructive transfer from one person to another of a controlled substance, whether or not there is an agency relationship." I.C. § 35-48-1-11. The State was required to prove Ferrell "knowingly or intentionally delivered cocaine in an amount of three grams or more." I.C. § 35-34-4-1. It is clear from the record in this case that Ferrell had actual possession of the cocaine and tossed the cocaine into the front seat of Detective Seay's vehicle; thus granting Detective Seay constructive possession over the cocaine. Therefore, regardless of whether Ferrell's appellate counsel argued constructive delivery, there is sufficient evidence to indicate Ferrell *delivered* the cocaine to Detective Seay, and there is no reasonable probability a different outcome would have resulted but for appellate counsel's alleged errors.

III. *Change of Judge*

Lastly, Ferrell argues the post-conviction court erred in denying his Request for Change of Judge. Specifically, Ferrell alleges the trial judge "was high or drunk during his trial and sentencing." (Appellant's App. p. 18). The State argues there is not sufficient proof of the requisite personal bias or prejudice necessary to grant such a request; thus, the post-conviction court did not err in denying the request.

Ind. P.-C. R. 1(4)(b) states:

> Within ten [10] days of filing a petition for post-conviction relief under this rule, the petitioner may request a change of judge by filing an affidavit that the judge has a personal bias or prejudice against the petitioner. The petitioner's affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. A change of judge shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice.

When a petitioner requests a change of judge, such change is neither "automatic" nor "discretionary." *Bahm v. State*, 789 N.E.2d 50, 54 (Ind. Ct. App. 2003), *trans. denied* (quoting *Lambert v. State*, 743 N.E.2d 719, 728 (Ind. 2001), *reh'g denied, cert. denied*). Rather, it requires a legal determination by the post-conviction court. *Bahm*, 789 N.E.2d at 54. We review the court's determination "under a clearly erroneous standard." *Id.* (quoting *Azania v. State*, 778 N.E.2d 1253, 1261 (Ind. 2002)). A decision is clearly erroneous if our review "leaves us with a definite and firm conviction that a mistake has been made." *Bahm*, 789 N.E.2d at 54 (quoting *Sturgeon v. State*, 719 N.E.2d 1173, 1182 (Ind. 1999)).

We presume a judge is not prejudiced against a party. *Bahm*, 789 N.E.2d at 54. To require a change of judge, a judge's bias must be personal. *Id.* Personal bias "stems from an extrajudicial source meaning a source separate from the evidence and argument presented at the proceedings." *Id.* (quoting *Lambert*, 743 N.E.2d at 728). Adverse rulings on judicial matters do not indicate a personal bias that calls the trial court's impartiality into question. *Bahm*, 789 N.E.2d at 54.

Ferrell's affidavit alleged the following reasons why the post-conviction judge was biased: (1) "the judge was high or drunk during his trial and sentencing, thus

resulting in petitioner filing a complaint against him to the Indiana Commission on Judicial Qualifications about his conduct and comments;" (2) the trial judge did not render a fair decision with respect to anything he decided at trial; and (3) the trial judge showed his prejudice and personal bias when he and Ferrell's trial counsel engaged in the following colloquy:

> [DEFENSE COUNSEL]: My concern is that . . . I've only been representing [Ferrell] two-and-a-half months . . . and in that short period of time, I've already been grieved . . . [Ferrell] might feel and it might appear as though I am not zealously representing my client due to the fact that he has grieved me.
>
> [TRIAL COURT]: Is that the case?
>
> [DEFENSE COUNSEL]: Oh, you know me better than that.
>
> [TRIAL COURT]: Well, I need -- I know that. I have to . . . ask that for the record.

(Appellant's App. p. 18). (Transcript pp. 6-7).

As abovementioned, adverse rulings on judicial matters do not indicate personal bias or prejudice. Here, Ferrell did not explain in his affidavit what personal bias the trial court's ruling actually created. Thus, we find the post-conviction court did not err when it refused to grant Ferrell's motion for a change of judge.

CONCLUSION

Based on the foregoing, we find that Ferrell's Request for Change of Judge and Petition for Post-Conviction Relief were properly denied.

Affirmed.

BAILEY, J., and MAY, J., concur.